of the driving factors behind Congress' decision to adopt the CMRS regulatory structure was the fact that "some licensees are using SMR as a vehicle to develop wide-area multi-channel interconnected systems that potentially offer the public a competitive alternative to cellular service."[37] Clearly, such services meet the "substantially similar" test as they "compete against each other to provide similar services to customers."[38]

Likewise, the Further Notice correctly concludes that private carrier paging services are substantially similar to common carrier paging services:

> Our existing Part 90 and Part 22 paging services appear to be similar in many respects. Both private and common carrier paging licensees provide one-way messaging service that is essentially interchangeable from the customer's point of view. The similarity of the services is accentuated by the fact that paging licensees in each band contend with certain common operating conditions regardless of their regulatory status.[39]

Moreover, the last vestige of historical differences between private carrier and common carrier paging licensees is expected to disappear in the wake of the Commission's recent decision to license most private paging frequencies above

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[37] Id. ¶ 15 (citing Second Report and Order at ¶¶ 7, 13).

[38] Id. ¶ 13.

[39] Id. ¶ 19.

900 MHz on an exclusive basis.[40] Local, regional and nationwide CMRS paging systems are expected to develop "on these frequencies that are technically similar to and competitive with existing common carrier systems."[41] It is now irrefutable that private and common carrier paging services are substantially similar for statutory purposes.

B. The Imposition of Comparable Requirements on Substantially Similar Services Should Ensure That Marketplace Competitors Are Not Hampered by Regulatory Discrepancies

By requiring only such rule changes as are "necessary and practical" to achieve regulatory consistency, Congress "appears to have recognized that some of [the Commission's] existing technical and operational rules may reflect objective differences in the technical configuration and operation of particular services."[42] Thus, the statute does not compel the rigid application of identical rules to all Part 22 and Part 90 licensees. Nevertheless, the Commission must undertake a thorough examination of its rules to determine when complete conformance is essential to fair marketplace competition and when different rules can be retained without competitive effect.

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[40] See id.

[41] Id.

[42] Id. ¶ 21.

In this regard, McCaw recommends that comparable requirements be extended not only to Part 22 and Part 90 services, but to Part 24 PCS licensees as well.[43] In addition to the different ability of PCS operators to provide combined CMRS and PMRS, PCS providers appear to hold other competitive advantages. For example, as discussed later in these comments, the PCS rules contemplate more options in providing fixed services than are found in the cellular service. This and other real differences should be resolved by affording all CMRS licensees the maximum level of flexibility granted to any particular class.

V. TECHNICAL, OPERATIONAL, AND LICENSING RULES

The Further Notice proposes a number of rule changes to extend comparable technical and operational requirements to substantially similar services. Consistent with the Commission's statutory obligation, these recommendations seek to ensure that "CMRS licensees providing substantially similar services will not be subject to inconsistent

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[43] The Further Notice recognizes this critical consideration in noting "the potential competitive impact of PCS on existing mobile services" and seeking "comment on the degree to which [the Commission] should conform [its] technical and operational rules for existing mobile services with [its] technical and operational rules for PCS." Further Notice ¶ 6. Nonetheless, the Further Notice fails to address significant differences in the regulatory obligations and opportunities respectively applicable to PCS and other mobile services. This omission is particularly troubling in light of the Commission's presumptive categorization of PCS as CMRS. Second Report and Order, 9 FCC Rcd at 1461.

regulation arising out of their prior regulatory status."[44] In this section, McCaw addresses certain of the proposals contained in the Further Notice.

A. Technical Rules

1. Antenna Height and Transmitter Power Limits

The Further Notice recognizes differences in the height-power rules applicable to cellular and ESMR services. Cellular base station power is limited to a maximum of 500 watts ERP with a maximum antenna height of 152 meters.[45] Trunked SMR systems and conventional SMR systems in urban areas may operate base stations at up to 1000 watts ERP at 305 meters above average terrain ("AAT"), while conventional systems outside urban areas are limited to 500 watts ERP and 152 meters AAT.[46] Finally, the recently revised PCS rules set the maximum ERP at 1,640 watts and maximum antenna height at 300 meters.[47]

McCaw recognizes that a number of technical and service considerations underlie the differences in antenna height-power rules in existing Parts 22 and 90. The Commission now, however, must ensure that these policies do not disadvantage

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[44] Id. ¶ 20.

[45] Id. ¶ 45; see 47 C.F.R. § 22.905 (1993).

[46] Further Notice ¶ 46; see 47 C.F.R. § 90.635 (1993).

[47] Broadband PCS Reconsideration Order, app. A § 24.232.

one group of competitors in contrast to another set of competitors. The review of the current limitations noted above demonstrates that substantial disparity exists in the rules governing the operations of services that admittedly are seeking to serve the same customers. Because the antenna height-power rules directly impact an operator's planning and costs of construction and operations, they can play a significant role in a service provider's marketplace and financial success. Absent any justification for the significant differences in standards, the height-power rules must be adjusted to achieve the statutory goal of regulatory parity.

2. Modulation and Emission Requirements

As pointed out in the Further Notice, cellular licensees currently are subject to specific emissions requirements.[48] The Further Notice proposes to delete emission restrictions in services like cellular where frequencies are authorized on an exclusive basis.[49] McCaw supports adoption of this proposal. As the Commission has recognized, the requirements are not necessary, and their removal will grant increased opportunities to licensees in their design of operations and services. Moreover, removal of emissions specifications where possible will increase conformance among Part 22, 90,

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[48] Further Notice ¶ 54.

[49] Id. ¶ 55.

and 24 services, by according all licensees comparable flexibility.[50] The result of the Commission's action should be an enhancement to the ability of CMRS operators to respond to customer needs with suitable service designs that are not artificially restricted by unneeded regulatory constraints.

B. Operational Rules

1. Construction Period and Coverage Requirements

McCaw endorses the effort of the Commission to define what it means by the "commencement of service," and to apply that as one facet of the steps constituting the required completion of construction. In the Part 22 Rewrite, McCaw supported the Commission's proposal for defining "provision of cellular service to the public,"[51] and suggested a similar definition for paging and radiotelephone systems.[52] In both cases, the definition focused on the system's interconnection to the public switched telephone network and its capability to provide service. A comparable definition, which recognizes that a system may be ready for use without yet having had potential subscribers seek to obtain service, should be adopted in this proceeding as well.

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[50] See id. ¶ 55.

[51] Part 22 Rewrite Notice, 7 FCC Rcd at 3744 (proposed § 22.946(a)(1)). See Comments of McCaw Cellular Communications, Inc., CC Docket No. 92-115, at 10-12 (filed Oct. 5, 1992) ("McCaw Part 22 Rewrite Comments").

[52] McCaw Part 22 Rewrite Comments at 13.

2. Permissible Uses

The primary focus of the Further Notice proposals addressing permissible use is elimination of Part 90 restrictions.[53] The Further Notice unfortunately fails to take into account a significant disparity in the permissible uses available to cellular service under Part 22 and PCS under Part 24. Specifically, PCS licensees are afforded greater flexibility to provide fixed services on their spectrum, as well as to provide both PMRS and CMRS on the same block of frequencies. Cellular licensees, on the other hand, operate under greater restrictions with respect to the inclusion of fixed services as part of their public offerings. Moreover, the Further Notice contemplates that cellular licensees would be allowed to provide only CMRS on their spectrum, and would be barred from providing PMRS.[54] Both differences can affect the CMRS operators to meet consumer needs by their design and tailoring of service opportunities.

In resolving these significant discrepancies, the Commission should be guided by the principle that all CMRS operators should have maximum flexibility, consistent with technical and non-interference requirements, to design service offerings and to compete with other providers of

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[53] See Further Notice ¶¶ 78-79.

[54] Id. ¶ 148 n.259. See discussion at pages 18-19, supra.

CMRS. In this situation, to ensure that no group of service providers is placed at a competitive disadvantage in terms of permissible activities and uses, the discrepancies should be resolved in favor of maximum flexibility. Thus, the Commission should extend to cellular operators and similarly situated CMRS providers the same flexibility it has granted to PCS licensees.

3. General Licensee Obligations and Equal Employment Opportunities

As proposed by the Commission, McCaw agrees that all CMRS operators should be subject to consistent general licensee obligations and equal employment opportunity obligations.[55] In particular, under present licensee management and control policies, McCaw understands that Part 90 licensees may be accorded greater flexibility in their service arrangements and management contracts. Part 22 licensees, in contrast, are governed by fairly strict, limiting standards.[56] McCaw urges the Commission to fairly apply its standards to all CMRS licensees, while authorizing maximum flexibility in system management agreements as may be permitted by the Communications Act. Uniform implementation of the Part 90 standards for management and similar

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[55] Id. ¶¶ 83, 85.

[56] See, e.g., Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications, Rpt. No. CL-93-141 (Sept. 22, 1993) (FCC Public Notice).

operational arrangements will often enhance the ability of licensees to develop their systems and more effectively meet customer needs. This outcome clearly furthers the public interest.

C. Licensing Rules and Procedures

The Further Notice contains a number of proposals addressing conformity in application and related policies and procedures. Some of these requirements (such as prior public notice requirements) are strictly mandated by the application of Title II to all CMRS operators, regardless of their prior licensing status.[57] The Further Notice thus seeks to adopt provisions "to ensure that new CMRS applications under Part 90 comply with the statutory requirements for licensing of common carriers under Title III of the Act."[58]

Application forms and procedures. McCaw supports the concept of a single application form, with modular parts, for all CMRS and PMRS applicants. The specific form appended to the Further Notice, however, requires further review, discussion, and modification. Despite the Commission's apparent desire to streamline and simplify the application form and process,[59] the proposed form and associated instructions in fact seems to be more complicated and

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[57] See Further Notice ¶¶ 106-07.

[58] Id. ¶ 107.

[59] See Further Notice ¶ 110.

difficult to understand and implement. As a result, the Commission is likely to receive an increased number of defective applications.

To ensure that the form can be properly evaluated by the mobile services industry and modified as necessary, McCaw urges the Commission to defer action on the form. The magnitude of the policy issues raised in the Further Notice, and the necessarily limited comment cycle, has meant that the form has not received the review and analysis required to assess any potential problems with its preparation and processing in a range of services. Subsequent to the Commission's action on the Further Notice, the form could be subjected to joint Commission staff and industry member discussions to resolve any "bugs" before the form is finalized.

The current draft of Form 600 requires applicants to provide geographic coordinates in both the NAD 27 and NAD 83 formats. This dual provision of information increases the likelihood that incorrect position data will be provided to the Commission and entered into the agency's database. The Commission has previously indicated that it would transition its computer facilities to the NAD 83 standard,[60] and McCaw urges the Commission to complete this transition as quickly

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[60] The Federal Communications Comm'n Continues To Require Applicants To Use Coordinates Based on the North American Datum of 1927, 7 FCC Rcd 6096 (1992) (Public Notice).

as possible. In the event that transition cannot be completed prior to finalization of the revised form, then the Form 600 should include spaces for entry of both NAD 27 and NAD 83 coordinates.

Transfer of Control and Assignment. While the Commission is reviewing basic application forms, McCaw believes that the transfer of control and assignment of license forms used by all CMRS licensees also should be conformed. At present, Part 22 licensees rely upon a single form -- Form 490 -- for transfers and assignments.[61] In contrast, Part 90 applicants for assignment must complete a full Form 574 and Form 1046 (or letter), and applicants for transfer of control must complete a very simple Form 703. These application filing requirements should be made more similar, with a single form applicable to all the entities. The revised unify form will need to request submission of all information necessary under the statutory provisions to permit processing of the transfer or assignment request. At the same time, the new form should seek only that information required by the Communications Act and the Commission's rules

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[61] McCaw urges the Commission, to the extent it retains the Form 490 information requirements, to omit the inclusion of copies of all authorizations and subsequent Form 489 notifications associated with the call signs encompassed by an application as an exhibit to the form. This information already is on file with the Commission, and appears to serve no necessary processing purpose. Transfer or assignment applicants should be required to provide only a listing of call signs as part of the application submission.

and policies, and not request any extraneous data or materials.

Similarly, the transfer and assignment policies deployed under Part 22 should be extended to all CMRS, to the extent that different rules are not in place for particular services.[62] The Part 22 standards balance free transferability with minimizing speculative behavior. Of course, to the extent that competitive bidding procedures are employed to address mutually exclusive proposals, concerns about speculative behavior are reduced anyway.

Qualifying Information. Consistent with Congressional intent and the adoption of a single form, all CMRS applicants should be required to provide comparable qualifying information. CMRS licensees are be assessed under the same statutory standard, and thus equivalent information is needed to review their applications and qualifications.

Application and Regulatory Fees. Application and regulatory fees also should be conformed as between Part 22 and Part 90 licensees. The current fee schedules reflect dramatic differences in the amounts paid for application processing and regulatory fees. To aid in placing all such licensees on comparable footing, CMRS operators should be governed by the same payment requirements.

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[62] For example, cellular unserved area authorizations may not be transferred or assigned until the proposed facilities are constructed and operated for one year. See 47 C.F.R. § 22.920(c) (1993).

Processing Procedures. The public notice, petition to deny, and mutually exclusive application filing procedures set forth in the Further Notice are largely mandated by the Communications Act in connection with its regulation of common carriers. McCaw strenuously objects, however, to the proposal to subject Phase II cellular unserved area applications to a 30 day window for the filing of mutually exclusive applications.[63] The proposal contained in the Further Notice simply ignores the rationale underlying the adoption of this procedure in the cellular unserved areas docket.[64] Among other things, the Commission did not want to "create an artificial incentive for parties to file applications for unserved areas."[65] At the same time, the Commission expressed its desire "to process applications in as rapid a manner as possible to promote prompt service to the public" and to provide "sincere applicants . . . with a fair opportunity to participate in the application process."[66]

The effect of the Commission's proposal in this docket would be to undermine the carefully considered policies

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[63] Further Notice ¶ 123.

[64] See Amendment of Part 22 of the Commission's Rules To Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service, 6 FCC Rcd 6185, 6196-97 (1991) (First Report and Order and Memorandum Opinion and Order on Reconsideration).

[65] Id. at 6196.

[66] Id.

previously sought to be implemented. Many Phase II unserved area applications are based on a carrier's plans to improve service within its existing service area as well as to increase the coverage area available for consumer access to cellular service. Given the history of cellular licensing, McCaw is concerned that a 30 day window for the filing of mutually exclusive applications would provide new opportunities for speculative filings or submissions designed solely to obtain a payoff (regardless of the limitations imposed by the Commission's settlement rules). As a result, the ability of cellular licensees and applicants to provide new or improved service to the public would be seriously hindered. The current filing procedure accordingly should be retained.

Amendment of Applications and License Modifications. It is clear that the Commission needs to develop rules applicable to all CMRS licensees to govern the definition of major/minor amendments and modifications.[67] Different policies have evolved in each of Part 22 and Part 90. McCaw believes that the Commission should be guided by the principle that application and amendment filings should be minimized as much as possible. Applications and notifications should be required only as necessary for the Commission to fulfill its Communications Act obligations and for licensees to implement interference-free operation.

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[67] See Further Notice ¶¶ 129-34.

In connection with this review of appropriate filing requirements, the Commission should bear in mind that it has omitted any requirement for PCS operators to submit notifications or other filings covering their specific facilities. Similarly, the Commission has previously proposed to delete the requirement that cellular licensees file Form 489 notifications regarding interior cell sites.[68] This step must be promptly implemented to level out partially the regulatory filing requirements currently imposed on PCS and cellular operators.

Fixed microwave licensing procedures. Cellular operators, like many other CMRS licensees, rely heavily upon fixed microwave facilities for important interconnection links. Part 21 (used for common carriers) and Part 94 (used for private microwave operations) should be reviewed for areas where rule changes are necessary to accommodate the new CMRS regulatory structure. Adoption of a further notice of proposed rulemaking in this docket would be an appropriate vehicle for exploring these rule changes.

VI. CONCLUSION

The Further Notice reflects a concerted Commission effort to implement the important regulatory policies adopted by the Second Report and Order in this docket to effectuate the Budget Act directives. McCaw commends the Commission's

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[68] Part 22 Rewrite Notice, 7 FCC Rcd at 3660-61.

activities in support of achieving regulatory parity for all CMRS operators. Adoption of rule provisions and policies consistent with the principles outlined above is an important step in attaining comparable regulation for mobile service providers.

Respectfully submitted,

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